NO. 8044.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ELECTRICAL RESEARCH PRODUCTS, INC., a corporation,

Appellant,

vs.

W. D. GROSS,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA, FIRST DIVISION.

BRIEF FOR APPELLEE

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SUBJECT INDEX

STATEMENT OF FACTS

(Page 1)

(With Special Reference to Facts Claimed by Appellant to be Admitted.)

POINT I.

(Page 2)

POINT III.

POINT IV.

POINT V.

POINT VI.

INDEX OF AUTHORITIES AND STATUTES CITED

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STATEMENT OF FACTS

The facts were fairly well discussed upon the oral argument and are set out quite fully in the original Brief, commencing on page 1. Then, too, it will be necessary to refer to the facts, to some extent, in connection with the points discussed in appellant's brief—this makes it unnecessary to refer to the facts at this time except to say that we cannot agree that the facts

listed by counsel on page 3 et seq. of his brief are in fact undisputed facts. Many of them are not only disputed, but wholly disproven by the evidence.

POINT I.

The appellant maintains, under this caption, that the Court erred in instructing the jury as follows:

> "And in this connection, I further instruct you that if you believe from the evidence that at the execution of these alleged contracts (of September 4, 1929) the plaintiff was already legally bound to render the defendant periodical inspection and minor adjustment services, under the contracts of March 28, 1929, it cannot recover for such services."

The exception taken to this instruction is in the following language:

> "We take an exception to instruction No. 2 * * *. We take an exception to that part of the Court's instructions commencing with line 20 on page 13 (Par. 8) * * *. (Pr. Rec. PP. 129-130; Pr. Rec. P. 1024).

It will be noted that the grounds of the exception are not stated, so that the exception presents nothing for review, either under Rule 10 of this Court or under the general law upon the subject.

In the case of *United States vs. United States Fidelity Co.* 236 U. S. 512; 35 Sup. Ct. R. 298-303, Mr. Justice Pitney, speaking for the Supreme Court say:

> "The primary and essential function of an exception is to direct the mind of the trial judge to a single and precise point in which it is supposed that he has erred in law, so that he may reconsider it and change his ruling if convinced of error, and that injustice and mistrials due to inadvertent errors may thus be obviated. An exception, therefore, furnishes no basis for reversal upon any ground other than the one specifically called to the attention of the trial court."

The exact point has been passed upon by this court in a number of cases. Thus in the case of *Sacramento Suburban Fruit Co. vs. Johnson* et. al., 36 Fed. 2nd. 925, it is said:

> "There are five specifications of error based upon exceptions to the instructions given, but these exceptions are insufficient, because in no case was the ground of the exception stated."

In *Howard vs. Beck*, 56 Fed. 2nd. 35, the effect of Rule 10 and the authorities bearing on this rule are considered and reviewed.

In the case of *State Life Ins. Co. vs. Sullivan*, 58 Fed. 2nd., 741-744, the exact point was again before this court. In that case it is said:

> "Appellant objects to two paragraphs of the charge given by the court to the jury. These exceptions do not state the ground of the objection, and are clearly insufficient to justify our consideration."

But there is nothing wrong with the instruction. The language objected to must be read in connection with what preceeds and follows it. The whole instruction so far as pertinent reads:

> "The defendant also claims that the alleged contracts of September 4, 1929, have no effect upon the defendant Gross, because they were executed without consideration.
>
> "In this connection I instruct you that when a party promises to do what he is already legally bound to do, or does what he is already legally bound to do, neither promise nor act is a valid consideration for another promise.
>
> "And in this connection I further instruct you that if you believe from the evidence that at the time of the execution of these alleged contracts the plaintiff was already legally bound to render the defendant periodical inspection and minor adjustment services, under the contracts of March 28, 1929, it cannot recover for such services; or if you believe from the evidence that the 'service' referred to in the alleged contracts of September 4, 1929, is something different or in addition to the 'inspection and minor adjustment service' referred to in the contracts of March 28, 1929, the plaintiff cannot recover therefor unless he has performed such service; and in this connection I instruct you further that there is evidence before you upon the question of what is meant by the term 'service,' when used in connection with the sale and use of motion picture sound equipment when used by those engaged in the business of supplying and dealing in motion picture sound equipment; and that if you find that this term 'service' has a meaning

> when used by persons so engaged, other and different from its ordinary meaning, you must apply that meaning to the term as used in said supplemental contract of September 4, 1929. The question of what is meant by the term when so used by persons so engaged, is a question of fact for the jury, and if the term when so used means something other and different from the 'inspection and minor adjustment service' hereinbefore referred to, then there was and is a consideration for the alleged contracts of September 4, 1929, and plaintiff would be entitled to recover therefor if it performed such 'service,' but would not be entitled to recover therefor unless it did perform and furnish such service, provided, of course, you find that the 'service' mentioned in the supplemental contracts of September 4, 1929, was not the same 'service' provided for in Paragraph 4 of the contracts of March 28, 1929." (Pr. Rec. PP. 994-995)

That the supplemental contracts of September 4 required a consideration to support them cannot be doubted. In volume six of Ruling Case Law at page 917—Contracts, Par. 301—it is said:

> "A valid consideration is an essential and indispensable element in every binding agreement. If a written contract is altered by agreement, such agreement must have the essential ingredients of a binding contract; and although it may have reference to, and indeed embody, the terms of the written contract, yet is must be founded on a new and distinct consideration of itself."

This is especially true of a contract such as the contracts P. Exhibits 1 and 3, which contain no pro-

vision relating to their amendment or modification at a later date, but which do contain a provision to the contrary. Paragraph 20, hereinafter quoted, provides that the contract contains the entire understanding, and that there is no agreement, express or implied, relating to the contract. (P. Rec. 168)

Since a consideration was necessary, it requires no citation of authorities to show that the Court was right in instructing the jury that "when a man does what he is already legally bound to do, his act is no consideration for a promise."—this is fundamental.

In the course of the discussion counsel for appellant, on page 18 of his brief, says:

> "The only explanation of this extraordinary ruling of the Court's is found in its subsequent instruction to the jury as follows: 'And in this connection, I instruct you that said agreement (of March 28, 1929) or either of them, do not require the defendant Gross to pay the plaintiff for periodical inspection and minor adjustment'."

In his brief counsel merely refers to his instruction with the apparent view of seeking an explanation for the Court's action in giving the instruction previously referred to, but upon the oral argument the last mentioned instruction was discussed to a considerable extent.

The objection taken to this instruction reads as follows:

> "Take exception to instruction number 7, particularly that part of it commencing at line 15, page 23, (2nd. Par.) as not being a true statement as to the effect of the contracts, exhibits 1 and 3 of March 28, 1929, and is not a statement in accord with either the law governing the contracts of March 28, 1929, or the facts produced in evidence as shown by the contract itself. We take the position there that throughout the case the omission of the amount in paragraph 6 does not make the service free." (Pr. Rec. P. 1024)

The exception as stated does not call the court's attention to any specific error of law; it does not point out any part of the contract referred to under which the contract required the defendant Gross to pay plaintiff for periodical inspection and minor adjustment service. In other words, it does not call the court's attention to the respect in which the court erred. All the objection amounts to is that the omission of the amount, in paragraph 6, does not make the service referred to in that paragraph free; but it is not pointed out where in the contract there is a provision that periodical inspection and minor adjustment service must be paid for. The exception taken would in no way aid the court in reaching the correct conclusion if there were anything wrong with the conclusion that the court had reached.

In the case of *Allison vs. Standard Air Lines*, 65 Fed. 2nd. 668, where this court had before it an exception that was uncertain in its terms, it is said:

> "These purported exceptions are not clear. They fall far short of that degree of succinctness and particularity that the courts have exacted of exceptions to instructions, on the ground that the lower court should be given a fair chance to correct any alleged errors in its instructions before the case is submitted to the jury.
>
> "We have studied these two purported exceptions very carefully, and we are convinced that they are fatally ambiguous, equivocal, and indefinite. Nowhere is there a specific statement of the error alleged to have been committed by the court."

In the case of *Davis vs. North Coast Transportation Co.* 295 Pac. 921, the Supreme Court of Washington had before it an exception reading as follows:

> "Defendants except to instruction number three for the reason that the same is not a statement of the law applicable to the case and not justified or warranted by the facts."

It will be noted that this exception was in some respects at least like the exception now being considered. In passing upon the sufficiency of the exception, it is said:

> "This exception in no way called the court's attention to the fact that in the instruction there was an incorrect statement of the law in that it was said that contributory negligence, in order to defeat a recovery, must have been the proximate cause of the injury. In *Kelly vs. Cohen*, 152 Wash. 1, 277 Pac. 74, 75, it was held that an exception to an instruction in this language, 'Defendant ex-

> cepts to instruction No. 5, upon the ground and for the reason the same is not a correct statement of the law, and not based upon the evidence in this case,' was too general and was not a compliance with the rule requiring instructions to be sufficiently specific to apprise the judge of the points of law or questions of fact in dispute."

To the same effect is the later case of *Parton vs. Barr*, 24 Pac. 2nd 1070.

The only portion of the exception taken that calls the Court's attention to anything at all, reads as follows:

> "We take the position there that throughout the case the omission of the amount in paragraph 6 does not make the service free."

No one contends that the omission of the amounts in paragraph 6 made the service, referred to in that paragraph, free; and the Court did not so instruct. The contention upon this point is simply this: that the omission of the amounts in paragraph 6 rendered the entire paragraph inoperative, so that the appellant was not required to render the service referred to in that paragraph and the appellee was not required to pay for it. But the Court's instruction does not in any way refer to "service" as that term is employed in paragraph 6.

Paragraph 4 of each of these contracts contains this provision: "Products also agrees to make periodi-

cal inspection and minor adjustments in the equipment after it shall have been installed."

Paragraph 6 relates to the payment of a weekly service charge—the blanks in this paragraph were not filled in. It is quoted correctly on pages 19 and 20 of appellant's brief.

Counsel in his brief, however, makes no reference to two other significant provisions in the contracts. Paragraph 8 of each of the contracts contains this provision: "The Exhibitor also agrees upon rendition of invoices to pay for any services rendered and expenses incurred by Products' employees in connecting with and for the benefit of the Exhibitor, except for the regular periodical inspection and minor adjustment service hereinbefore provided for." (Pr. Rec. P. 178) The closing words of this paragraph, "except for the regular periodical inspection and minor adjustment service hereinbefore provided for," are not discussed or referred to by appellant's counsel in his brief at all; in his brief, appellant's counsel deals with the contracts as though they did not contain this provision. Counsel simply takes the position that "periodical inspection and minor adjustment," as this phrase is used in paragraph 4 is synonymous with the term "service," as this term is employed in paragraph 6. He then assumes that paragraph 6 provides that the "service," whatever it is, is to be paid for at whatever schedule appellant may from time to time adopt, and that the ef-

fect of leaving the blanks in paragraph 6 is simply to take away the limit on what appellant may charge from time to time, so that under paragraph 6 appellee is obliged to pay whatever appellant may from time to time demand. Counsel for appellant then proceeds to ignore the provisions of paragraph 8, which provide that the inspection and minor adjustment service is not to be paid for at all.

Now, in considering the meaning of this contract, we are met with the difficulty that neither the phrase "periodical inspection and minor adjustments," nor the phrase "service and inspection" is defined or explained—there would be no way to decree specific performance of the provisions of the contract in which these terms occur. This is not a suit for specific performance, but a forfeiture is asked for, and the right to the forfeiture depends upon the meaning of these terms. The point is that the Court would not permit a forfeiture on account of the failure to pay money for something that is described in such uncertain terms that the court could not compel its specific performance—there would be no way for the court to tell whether the party asking for the forfeiture had done what he should have done to entitle him to the money the failure to pay which lay at the basis of the right to a forfeiture claimed by him. Before the appellee's right of possession can be forfeited or terminated under these contracts, the reluctance of the Courts to permit a forfeiture must be overcome by an explicit

showing that the right to a forfeiture exists; this requires something more than a showing based upon words of such doubtful and uncertain meaning as those employed in this agreement.

But the evidence shows, that to those engaged in the motion picture business, these terms have a definite meaning, and that the making of minor adjustments is one thing, and the rendition of service quite another thing; that to make minor adjustments merely means, as the term implies, to adjust the parts of equipment that is in a good state of repair—a thing that can be done periodically and occasionally; but that to "service" the equipment, as that term is employed in paragraph 6, is to keep the equipment in repair, and not only to put it into repair when it is out of repair, but to keep a competent person within reach and on call at all times so that the theatre-operator can reach him at any moment and get him to put the equipment back into repair when something goes wrong with it. This "service" is rendered immediately and at all times. (Ev. Cawthorn, Pr. Rec. PP. 473-474-475; Ev. Clayton, Pr. Rec. PP. 783- 784.)

The evidence upon this point is not only uncontradicted; but while Mr. Wilcox, the Vice-President of appellant, testified as a witness and gave a rather involved definition of "service," he does not deny that this distinction between the meaning of the term "service" and "minor adjustments" exists. Referring to

the question of what "service" consists of, Mr. Wilcox says in part: "Plaintiff also furnished a service man day or night on call whenever the theatre was running; the operator had nothing to do if anything was wrong except to call the office and get a service man right away." (Pr. Rec. P. 292) In the face of this solemn admission, by the Vice-President of appellant, as to what "service" consists of, there is no room for saying that an occasional visit, by a salesman who makes minor adjustments in the equipment as he goes along, constitutes "service" as that term is employed in paragraph 6 of the contract.

Under the contract, the making of periodical inspections and the making of minor adjustments is a privilege rather than a duty. Paragraph 12 of the contract provides that the Exhibitor shall permit Products to make inspections; and paragraph 4 provides that Products shall have the right to require the installation of new parts; paragraph 2 provides that the Exhibitor shall purchase these new parts from Products and from no one else. Thus, what appears as a duty is converted into a privilege—a privilege which makes of every service man a salesman with power to dictate what the buyer shall buy. Obviously, to sell new equipment and new parts, it was necessary for appellant to go over and inspect the equipment periodically, and to send a man to the theatre for that purpose. Appellant sent what are called "service-men" to the theatres of appellee about once a month—not al-

ways that often. These men came to inspect the equipment and to sell merchandise. (Pr. Rec. P. 374)

On page 288 of the Record, the witness Lawrence, who served as one of appellant's service-men and who was called by appellant as a witness, puts it this way:

> "I made those inspections with the view of preventing breakdowns; my work amounted to more than that, though; periodically we received engineering information from our Engineering Department of new discoveries and improvements and we put those into effect in the equipments in the theatres we were servicing, having a regular service of information of that sort forwarded to us and it was our duty to see that those new devices were installed in those theatres if we could sell the defendant on the idea."

Naturally enough, the contract provides that this periodical inspection and minor adjustment service is to be rendered without extra charge. Paragraph 8, as already pointed out, provides:

> "The Exhibitor also agrees upon rendition of invoices to pay for any services rendered and expenses incurred by Products' employees in connection with and for the benefit of the Exhibitor, except for the regular periodical inspection and minor adjustment service hereinbefore provided for." (Pr. Rec. P. 178)

The first portion of this paragraph provides in general terms that the exhibitor agrees to pay for any service rendered for the benefit of the exhibitor. If

nothing more were said, the "periodical inspection and minor adjustment service" referred to in paragraph 4 would have to be paid for. This would be so because the phrase "any service" is equivalent to all service. In order to avoid that construction, it was necessary to add the concluding portion of the sentence, which reads: "except for the regular periodical inspection and minor adjustment service heretofore provided for." Obviously, the purpose was to provide that the periodical inspection and minor adjustment service provided for in paragraph 4, was not to be paid for—that it was something that was to be taken care of by the high rental charge that was to be paid. If that was not the purpose, why was the clause inserted? Upon the trial, counsel for appellant contended that what the concluding clause really refers to is the service to be rendered under paragraph 6. Not, that this service should not be paid for; but that the clause should be construed as though it read: "except for the regular periodical inspection and minor adjustment service *the payment of which is* heretofore provided for." But if the payment of the service to be rendered had already been provided for, why provide that it should not be paid for? If the service was to be paid for anyway, why except it from a provision making a general provision for payment? Why speak of it at all? It would take care of itself. The courts do not presume that parties to a contract use idle and unnecessary language; and it goes without saying

that they will not resort to the interpolation of words in order to convert what is essential, plain and unambiguous into what is unnecessary, uncertain and meaningless.

The Court merely gave effect to this provision in the contract when it instructed the jury that: "Said agreements (of March 28, 1929) or either of them, do not require the defendant Gross to pay the plaintiff for periodical inspection and minor adjustment." And as already pointed out, the exception taken does not relate to periodical inspection and minor adjustment at all—it is to the effect that the leaving of blank spaces in paragraph 6 did not make the service free. Of course, no one contends that the leaving of these blank spaces resulted in requiring appellant to render service free—it simply resulted in making the whole paragraph inoperative, so that appellant was not required to render "service," and appellee was not required to pay for it. In other words: appellant was not required to keep appellee's equipment in repair, and it may be added parenthetically that it never kept a service-man on call and never made a single repair to the equipment. (Pr. Rec. P. 675; P. 823) And while appellee Gross was not required to pay for this services, it became necessary for him to spend large sums in qualifying his own men and securing instruction for them, and also in hiring additional qualified help to keep his own equipment in repair; which he did. (Pr. Rec. PP. 318; 672; 801.) (Also Record P.

784 and P. 832.) Upon the question of how thoroughly and exclusively the equipment was taken care of by appellee's own men see: (Pr. Rec. P. 674 et seq.; P. 802 et seq.; P. 826 et seq.)

The question of what was the effect of leaving the blanks in paragraph 6 therefor becomes immaterial in so far as a discussion of this particular instruction given by the Court is concerned, but since counsel has discussed the matter, we do not feel warranted in ignoring it. At the outset, we must bear in mind that this contract is written upon a printed form prepared by appellant; ostensibly for appellant. In such cases the contract is always construed most strictly against the party by whom it was prepared. The contract contains no express provision under which appellant agrees to render "service," as defined by the witnesses and as it is admitted to be by Vice-President Wilcox; this, for the obvious reason that an express obligation to keep the equipment in repair might lead to endless and costly litigation. All the contract contains—if the blanks are filled in—is a provision to pay at a fixed rate for service, which, it is apparent from the testimony of Vice-President Wilcox, was customarily rendered. (Ev. Wilcox, Pr. Rec. P. 292). Standing alone, the provision would be without consideration, but as part of the original contract—if the blanks had been filled in at the time of its execution—the mutual covenants of the contract might supply the consideration.

But the blanks were not filled in and the question is: What was the effect?

At the outset it must be noted that there is no room for implied authority or separate understandings with reference to these blanks. Paragraph 20 of the contract expressly provides:

> "The parties hereto expressly stipulate that this agreement as herein set forth contains the entire understanding of the respective parties with reference to the subject matter hereof, and that there is no other understanding, agreement or representation, express or implied, in any way limiting, extending, defining or otherwise relating to the provisions hereof or any of the matters to which the present agreement relates." (Pr. Rec. P. 186)

It was the obvious purpose of the parties to leave paragraph 6 incomplete and ineffective—leave it out of the contracts entirely, as though it had never been there. And this is in accord with the verbal testimony of the parties upon the subject. Appellant's witness Anderson, by whom the contracts were executed on behalf of appellant, testifies as follows: "In view of the uncertain situation with respect to Alaska, the plaintiff company had no knowledge at the time of the negotiation of the contracts, exhibits 1 and 3, of the probable cost of furnishing engineering service for the theatres in that territory."

It was consequently unwilling to enter into a contract which would fix the amount of its compensation

for the rendering of such service when the cost of rendering it was still an unknown quantity and was willing only to enter into such contract upon the understanding that the weekly charge for servicing would be made the subject of a subsequent agreement between the plaintiff company and the exhibitor. Accordingly, when the contracts, Exhibits 1 and 3, were executed, the amount of the weekly charge for servicing the equipment was left blank." (See Pr. Rec. PP. 169-170) A portion of this evidence was probably incompetent, in view of the provisions of the written agreement, and it was admitted over appellee's objection; but the important thing about the evidence is that it shows an unwillingness on the part of appellant to make paragraph 6 complete or effective at the time the contract was executed. Then too, Gage, appellant's agent, told appellee that the contracts had been executed with the service clause left out and that appellee would have to provide his own service man. (Ev. Gross Gross, Pr. Rec. PP. 117-118; Ev. Cawthorn, Pr. Rec. P. 476); Gross made provision to service his own equipment. (Pr. Rec. P. 318); Wilcox, appellant's Vice-President, said, "Gross has no service with us." (Ev. Gross Pr. Rec. P. 319; Ev. Lemieux, Pr. Rec. P. 802); no attempt was made by appellant to collect service charges until it attempted to secure a supplemental agreement providing for them. (Ev. Gross, Pr. Rec. PP. 319-320); and, finally, appellant used highly coersive measures to bring about the execution of a

subsequent agreement with a view of making paragraph 6 effective. It may be added that it was upon the supplemental agreement that appellant relied to recover service charges in this action. Obviously, it did not consider itself entitled to service charges under the original agreement at the time this action was brought. All this goes to show that all were agreed that paragraph 6 of the original contracts was and is of no effect.

But we are not compelled to rely upon the testimony and acts of the parties, for the Courts have uniformly held that printed forms with the blanks left blank are ineffective, because incomplete, in so far as the provisions in which the blanks occur are concerned.

The exact point was before the Court in the case of *Church vs. Nobel*, 24 Ill. 292. It was an action on a lease contract.

According to the opinion, the defendant had agreed to do certain things under certain conditions, and "in addition thereto to pay the plaintiff the sum of $————." In affirming a judgment denying relief, it was said: "The party of the first part did not contract to pay anything in addition, for blank dollars are no dollars. We cannot make contracts for parties; we can only interpret them to enforce them. We interpret this to mean that $————dollars are the measure of damages agreed upon by these

parties; and they are no dollars, and therefore nothing was to be paid."

The case of *Rhyne vs. Rhyne*, 66 S.E. 348, was an action on a bond containing a blank which had not been filled in. A judgment granting relief was affirmed because the amount could be ascertained from other parts of the contract; but the Court took the precaution of adding: "We recognize the general rule that if a blank be left in an instrument, the omission may be supplied only if the instrument contains the means of supplying it with certainty."

In the case of *Lore vs. Smith*, 133 So. 214, the Supreme Court of Mississippi was called upon to decide what effect was to be given to a clause in a deed of trust, upon a printed form, containing blanks that had not been filled in. In denying relief, it is said:

> "The omission to fill in the blanks in the future advance clause of the deed of trust indicates an intention that the clause should not become operative, unless an agreement can be implied therefrom that the grantee or cestui que trust should fill the blanks in accordance with the intention of the parties. We are not called upon to decide whether such an implication here arises; for the grantee or cestui que trust did not attempt to assert such a right, but recorded the deed of trust without filling the blanks. 'A writing is incomplete as an agreement where blanks as to essential matters are left in it, unless they can be supplied from other parts of the writing itself.' 13 C. J. P. 308, or unless and until such blanks are lawfully filled."

This case is on all fours with the case at bar.

In the face of all this, counsel maintains that the later portion of the section was rendered meaningless by not filling in the blanks, and that the effect of not filling in the blanks is simply this: That while this provision which contains the blank places a limitation upon the amount that can be charged by Products, the failure to fill in the blanks makes this provision meaningless so as to wipe out this limitation and give Products a right to charge whatever it pleases—in other words it takes off the limit. This would indeed make the contract a very remarkable document, under which one party agrees to pay whatever the other party may demand. But the decisions of the Courts do not permit the adoption of any such construction. In the case of *Church vs. Nobel*, 24 Ill. 292, the Supreme Court of Illinois held that blank dollars means no dollars, and that an agreement to pay blank dollars was an agreement to pay no dollars. Applying that decision to the facts before us, paragraph 6 of the Contract is made to read:

> "The amount of such payment shall be in accordance with Products' regular schedule of such charges as from time to time established. Under Products' present schedule, the service and inspection payment shall be 'No Dollars' per week, which charge shall not be exceeded during the first two years of the period of said license and thereafter for the balance of the term of said license shall not exceed the sum of 'No Dollars' per week." (Pr. Rec. P. 177)

And this decision of the Supreme Court of Illinois, is in exact accord with the other decisions cited above upon this point.

The effect of these decisions is simply to make the whole of section 6 inoperative. This contract was made upon a blank form supplied by appellant. The provisions of paragraph 6 didn't fit the case. The parties didn't print another blank form, but simply used the one they had and left the blanks blank with the obvious purpose in view of making the whole paragraph inoperative. According to the testimony of the Witness Anderson, appellant was unwilling to sign a contract with these blanks filled in. There was no way to tell what the cost of the service would be, and subsequent developments simply showed that the service couldn't be rendered at all. It was the evident intention to leave paragraph 6 inoperative, just as though it had never been, and this is also the intention that the Courts impute to the parties in such cases, as was said in *Lore vs. Smith*, 133 So. 214, above referred to: "The omission to fill in the blanks in the future advance clause of the deed of trust indicates an intention that the clause should not become operative." Any other interpretation would lead to ridiculous conclusions, as the interpretation placed upon the contract by counsel for appellant at the present time would place upon appellee burdens that no rational man would assume. It may be true that a Court of law cannot relieve a party from the performance of obligations

that are harsh and burdensome, but it is also true that a Court will not adopt a construction that will lead to the imposition of harsh and unusual burdens and that will lead to ridiculous conclusions, if the contract is open to another construction that is both fair and rational.

But what is far more significant, the construction urged by counsel for appellant would make the provisions of paragraph 6 void for uncertainty—there would be no way to tell the amount to be paid from the contract. It would not be a case in which the amount to be paid could be determined from a fixed schedule to which reference was made in the contract. The schedule would not be fixed— it would be whatever schedule appellant might "from time to time establish" —appellant might establish one schedule today and another one tomorrow. The amount to be paid would depend entirely upon the whim and the will of appellant; in other words, it would be an agreement to pay whatever appellant might from time to time demand, without limit and without restriction. This would not be a contract at all. A contract, among other things, is an agreement to do a certain thing—not an agreement to do what one of the contracting parties may require.

POINT II.

Under this heading appellant's counsel complains because the Court refused to instruct the jury that at

the beginning of the trial appellee owed appellant $91.01 for additional equipment furnished by appellant. The point is sought to be raised on the refusal of the Court to grant an instruction set out at length on page 22 et seq. of appellant's brief. A general exception was taken to the refusal of the Court to grant this instruction, but no grounds of exception were stated. (Pr. Rec. P. 978) Under these circumstances the exception raises nothing for review; but even though the matters urged by counsel were stated as grounds for the exception, the point would be without merit.

Section 8 of the contract provides in part: "The exhibitor agrees to pay * * * for any additional equipment * * * upon delivery thereof." (Pr. Rec. P. 178 There is no evidence in the record that the parts referred to in this instruction were ever delivered. Hence, there is no evidence to show that anything was due on account thereof. But there is abundant evidence to show that appellee had over-paid appellant to the extent of many thousand dollars under duress and otherwise. Hence, to give this instruction would be to instruct appellee's counter-claims out of the case.

On page 22 of appellant's brief it is said:

> "On the trial, plaintiff proved by uncontradicted, documentary evidence that it furnished additional equipment and parts to the defendant; that the defendant received, and receipted for, this equipment; and that there was due and un-

> paid, when this action was begun, $29.09 for such equipment furnished at Juneau and $61.92 for such equipment furnished at Ketchikan."

Counsel is mistaken in this. Neither the documentary evidence nor any other kind of evidence proves what counsel says was established. The fact that these small amounts—$29.09 for Juneau and $61.92 for Ketchikan—were due and owing, is denied by the Answer. The only evidence offered at the trial by the appellant upon this subject was the evidence of one Pearsoll. He testified on page 299 of the Record as follows:

> "Plaintiff has the original orders for that spare parts and additional equipment and his receipts therefor, signed by defendant or his manager, which I now produce."

The record then proceeds:

> "Whereupon said orders and receipts were received in evidence marked Plaintiff's Exhibit No. 26."

Now, the particular items for which suit was brought are described in the Complaint. Those furnished to the Juneau theatre are referred to on the bottom of page 6 of the record and on the top of page 7 as having been furnished between May 20, 1930, and February 17, 1931; and those furnished to the Ketchikan theatre are described on page 13 of the record as having been furnished between April 7, 1930, and February 18, 1931.

Turning now to Exhibit 26 and 27: they contain all the receipts signed by appellee, or his agents, for merchandise delivered; and, according to the testimony of Pearsoll, the receipts in these exhibits cover all the merchandise that was delivered. We find that exhibit 26 contains no receipts signed by appellee Gross or anyone else, although exhibit 27 does contain such receipts; but each and every one of these receipts was signed prior to April, 1930, so that not one of them is a receipt for any of the merchandise sued for in the Complaint.

On the bottom of page 307 is one of two receipts for goods shipped that comes within the dates mentioned in the Complaint. It reads as follows:

> "Order dated 7-16-30 shipped to Coliseum Theatre, Juneau, receipted by J. S. Briggs, viz."

Now, while this receipt was signed, it wasn't signed by the appellee or any of his agents. J. S. Briggs was the agent of appellant: he was the man who was the head of the Seattle Service Department, residing at Seattle, at that time, and had nothing to do with appellee whatsoever. He testified in this case as one of appellant's witnesses and supplies us with all this information. (Ev. Briggs, Pr. Rec. P. 912)

On page 308 of the transcript is another order dated 7-16-30, shipped to Coliseum Theatre, Ketchikan, receipted by J. S. Briggs. This order also comes within the time, but this is the same J. S. Briggs who signed

the receipt just previously referred to—he was the agent of appellant, and not the agent of appellee.

If these receipts, signed by Briggs, prove anything, they simply prove that these shipments were shipped from Los Angeles to Seattle, to Briggs, and that they are still at Seattle and never went any further, so that there is not only a failure of proof that these items were delivered to appellee, but the receipts themselves show that they were never delivered to appellee but to Briggs.

But this liability exists, if it exists at all, under the provisions of Par. 8 of the contract, which provides that what appellee agrees to pay to appellant for the articles of merchandise referred to is appellant's "list of installation charges as from time to time established." It is not only impossible to tell from the contract what the amount to be paid shall be, but the whole matter is left to the will of appellant—no one can tell what the price will be until appellant has expressed its will by establishing, from time to time, its lists of prices. Obviously, this provision is void for uncertainty. It must be borne in mind that this is not a case where a party agrees to pay according to an established schedule, but according to whatever schedule may from time to time be established by the other party. If merchandise were actually delivered under this provision, its reasonable value could be recovered on a quantum meruit; but a failure to pay such reasonable

value would not work a forfeiture of appellee's rights under the original contract.

On page 24 counsel quotes the instruction that the Court did give with reference to the amounts due for additional and spare parts. He then criticises this instruction as being obscure or confusing. No exception was taken to it. That being so, it became the law of the case, so that no further instruction upon that subject was either necessary or proper, and the Court's action in refusing to give a further instruction was not error.

But as we have already pointed out, there was not only a failure of proof on the part of the appellant in that it didn't prove that these articles were ever delivered to the appellee, but the appellee had also introduced evidence that he made over-payments in the way of monies paid under duress which were then in the possession of the appellant, and which, of course, would be a set-off to any claim for spare parts or other merchandise, and which could in any case be applied as payment for such merchandise.

POINT III.

Under this heading counsel for appellant maintains that the Court erred in giving an instruction which is set out at length on page 26 and 27 of appellant's brief.

To this instruction appellant took an exception in the following language:

> "We except to that part of the court's instruction No. 3, commencing on line 21, page 15, par. 4, down to the remainder of that particular instruction 3, on the ground it does not state the true principle of law applicable to written instruments or contracts particularly, and that neither party is bound by the particular provision that only a president or vice-president could change these contracts if they afterward agree to change them otherwise." (Pr. Rec. PP. 1025-1026)

Here is an attempt to state the grounds of the exception; but the grounds, as stated, are too indefinite, uncertain, and incomplete—they are not such as to direct the attention of the trial court to any particular mis-statement of law. It is objected that the instruction "does not state the true principle of law applicable to written instruments;" but there are many legal principles applicable to written instruments, and it is not stated which of these is violated, nor is the court's attention called to the true principle that should govern—so far we have nothing but a general objection. The objection continues, "and that neither party is bound by the particular provision that only a president, or vice-president could change these contracts if they afterwards agree to change them otherwise;" but the instruction does not deal with this matter at all. The court does not instruct that the provision relating to the authority of agents in any wise limit the parties themselves. The instruction deals solely with

the authority that third parties—agents and representatives—can exercise on behalf of the parties under the provisions of the contract and with the manner in which this authority must be exercised. No part of the objection, therefor, calls the court's attention to any mis-statement in the instruction.

This exception is not sufficient. *Allison vs. Standard Air Lines*, 65 Fed. 2nd. 668; *Davis vs. North Coast Transportation Co.* 295 Pac. 921; *Parton vs. Barr*, 24 Pac. 2nd. 1070). These and other cases were discussed at some length in connection with the discussion had under Point I of this brief.

The first objection to the instruction, urged by counsel in his brief on pages 27 and 28, is that the Court told the jury ratification by the parties was necessary; while the appellant maintains—we think erroneously—that ratification by one party would be sufficient. It would seem that if a contract were made in violation of the provisions contained in an earlier contract between the parties that ratification by both parties would be necessary. But even though counsel were correct in his contention, he is not in position to raise the question now. There is absolutely no reference in his exception to this matter at all.

The first portion of the instruction excepted to is a mere statement, word for word, of the language of the original contracts. Here there is no room for error.

The alleged contracts of September 4 (Ex. 2 and 4) referred to in the instruction are upon the printed letter-head of appellant. Exhibit 2 is set out at length on pages 189 and 190 of the Record. Exhibit 4 is exactly like exhibit 2 except that it relates to the Ketchikan theatre.

It will be noted that these agreements do not purport to be the agreements of appellant. Appellant's name is not even mentioned in them. True, they are written on appellant's letter-head, but the letter-head forms no part of an agreement written under it. If it did, many people—hotel-keepers, for instance—might find themselves entangled in strange and unlooked for complications. The rule is that printed matter in the heads of letters upon which a contract is written, which is not referred to in the writing, is not a part of the contract.

Summers vs. Hibbard, 153 Ill. 102, 38 N.E. 800.
Lumber Co. vs. McNeeley, 108 Pac. 621.

In *Summers vs. Hibbard* it was held that the words, "All sales subject to strikes and accidents" printed on the caption of the paper on which was written the unqualified acceptance of a contract of purchase did not have the effect of reading them into the agreement thereby consummated. The court said:

> "The mere fact that appellants wrote their acceptance on a blank form for letters at the top of which were printed the words 'all sales subject to

> strikes and accidents,' no more made those words a part of the contract than they made the other words there printed, 'Summers Bros. & Co., Manufcturers of box-annealed common and refined sheet-iron,' a part of the contract."

If, as the court says, the name of Summers and Co. did not become a part of that contract, the name of the Electrical Research Products Co. did not become a part of the contract now being discussed.

The second case cited follows the first.

These contracts, Ex's. 2 and 4, do not contain appellant's name and do not refer to the letter-head and they were not signed by appellant but by one Anderson who adds the word "Comptroller" to his signature without indicating whom he is comptroller for. Nor does the letter-head show Anderson to be the comptroller for appellant. Now it is the rule that where an instrument is signed by an individual who signs as agent or representative it may be shown that he acted for a principal described in the writing; but in this case the alleged principal is not even referred to in the writing. Nor is the word "comptroller" synonymous with the word "agent"—a comptroller is not an agent at all. A comptroller, generally speaking, is one who examines accounts, not one who exercises the authority of another.

Nor is this all, Ex's. 2 and 4 refer to the contract to be modified as one relating to the "installation and use of 'Western Electric Equipment'." The original

contracts are not for Western Electric equipment but for "Type 2-S equipment." It is true that this equipment is often referred to as Western Electric equipment, but the term Western Electric is not used in the contract in describing the equipment. The only reference to Western Electric Equipment in the original contract is in Par. 23, which provides for the termination of a previous agreement which did relate to Western Electric equipment. (Pr. Rec. P. 187)

Nor is there anything in the Record to show that Anderson had authority to execute these agreements in his own name as comptroller or otherwise. His authority is defined in the two resolutions of the board of directors, as authority "to sign in the name and on behalf of the company contracts, etc." (See Pr. Rec. P. P. 192 and 193) These resolutions certainly do not authorize Anderson to sign contracts in his own name.

The portion of the charge that submits the issue to the jury immediately precedes the portion specifically complained of, and is as follows:

> "In this connection I instruct you that the alleged contracts are signed by one "Anderson" who signed the same as 'Comptroller' without further describing himself, and that the question of whether said 'Anderson' was acting for himself or for the plaintiff corporation is a question of fact to be determined by you under the evidence and these instructions." (Pr. Rec. P. 996)

The appellant takes no specific objection to this portion of the instruction; but the instruction must be

considered as a whole, so that it becomes necessary to inquire into the whole matter, at least to some extent in order to show that the issue was fairly presented to the trial jury.

Turning now to that portion of the exception which reads: "that neither party is bound by the particular provision that only a President or Vice-President could change these contracts if they afterwards agreed to change them otherwise." The provision of the contract referred to in the exception reads:

> "No agent or employee of Products is authorized to alter or modify this agreement in any way unless such alteration or modification shall be approved in writing by the Rresident or a Vice-President of Products, or by such representatives as may from time to time be designated in writing by either of such officers." (Pr. Rec. P. 186)

There is no evidence in the Record tending to prove that the contracts in question were approved in writing or otherwise by the President or Vice-President or by any other representative designated by such officers.

Now, where did Anderson's authority come from? The board of directors had authorized him to make contracts in the name of and on behalf of the company, but not in his own name. In any event the resolution did not comply with the provision of the contract because the board is not the President or Vice-President. Then, too, the action of the board was something to which

Gross was not a party and about which he was not informed. Gage forced Gross to sign these contracts under duress but told him nothing about Anderson. (Ev. Gross, Pr. Rec. P. 325). Nor could Anderson have power to modify this particular contract under any general authority conferred on him in the face of the specific limitation upon such authority contained in this contract. It requires no extended discussion to show that in such case the general authority would be limited by a specific limitation such as that contained in the contract. Let us put the shoe on the other foot. Let us suppose that the appellee should bring suit to enforce these contracts and that appellant should set up Anderson's lack of authority as a defense. Does any one suppose that Gross could prevail? He had solemnly agreed with appellant that there should be a limitation upon Anderson's power, and no subsequent agreement had removed this limitation.

Seemingly counsel invokes the legal principle, that if parties have the power to contract, they have the power to modify the contract made in any way notwithstanding limitations upon their power in this regard by the terms of the contract. But this stipulation is not a limitation upon the powers of the parties in respect to a modification of the contract; it merely provides that third parties, agents of appellant, shall not have power to bind appellant except in the manner prescribed. Now, it is idle to say that this provision has no legal effect—it is not against public policy—

there is nothing wrong with it. The parties themselves may ignore limitations placed upon their own power, but this does not mean that third parties can ignore limitations upon their authority and still bind the parties who have agreed upon the limitation. To adopt counsel's view would be equivalent to saying that under the provision a third party cannot act except in the manner prescribed unless he chooses to act in some other manner.

The effect of the insurance cases cited by counsel is well illustrated by the first case cited. It is only necessary to consider the portion quoted by counsel on pages 28 and 29. At the outset the Court says that provisions in an insurance policy, more or less similar to the provision in the contract now under discussion, are "integral parts of the policy and until revoked or modified in some legally recognized manner are valid and binding upon the insured." The court then holds that the company cannot contract itself out of the legal consequences of its subsequent acts, and that it is legally possible for it by duly authorized action, to destroy the special protection as originally set up. There is no doubt about the correctness of this decision. The appellant and appellee could have entered into a subsequent contract doing away with this limitation upon the power of appellant's agents, but Anderson, who was an agent to which this limitation of power applied, could not make a contract in his own name or in the name of the corporation, for that matter, in disregard

of the limitation placed upon his own power. To hold otherwise would be to hold that a third party, shorn of power by the parties to a contract, could invest himself with the very power of which he was deprived, by simply exercising the power which the parties themselves had agreed he should not possess.

Moreover, the whole point is immaterial, for if what is referred to as error were error it would be harmless. The evidence conclusively, shows that the signature of Gross to these contracts was procured by threats which amounted to duress; and the jury so found by finding for appellee on the second counterclaim; that the contracts lack consideration; and that no service was ever rendered under them—that appellee's own men made every repair that was ever made.

POINT IV.

Under this heading counsel for appellant contends that the Court erred in denying plaintiff's motion to strike the allegations of duress from defendant's First and Fourth Affirmative Defenses as irrelevant and immaterial. A general exception was taken to the order over-ruling the motion, but no grounds of exception were stated. (Pr. Rec. P. 168)

Counsel does not take the position that the defense of duress was not properly pleaded, but that this defense should have been stricken because it was imma-

terial for the reason that it made no difference whether the contracts of September 4, 1929, were valid contracts or not, in that the obligation to pay service charges rested not upon the contracts of September 5, but upon paragraph 6 of the original contracts; the contention of counsel being that these contracts of September 4 were mere letters and not contracts at all, so that they didn't require the signature of appellee, and that this being so it is wholly immaterial whether appellee signed them or not.

But in the Complaint, appellant not only holds out these documents of September 4 as contracts, but it bases its action upon them. Paragraph 2 of the complaint (Pr. Rec. P. 2) reads in part as follows:

> " * * * Plaintiff and defendant heretofore and on or about March 28, 1929, entered into a certain written agreement, and thereafter and on or about September 4, 1929, mutually modified said agreement, in which agreement, as so modified, they mutually agreed, among other things * * * ."

Indeed, if these documents are not contracts all the exceptions taken relating to matters connected with their execution become immaterial, and appellant's action fails for, as was pointed out under point one in this brief, the leaving of the blanks in paragraph 6 makes that paragraph ineffective for any purpose.

POINT V.

Under this heading counsel maintains that the Court erred in over-ruling appellant's demurrer to the Second and Fourth Counterclaims for the recovery of monies alleged to have been paid to appellant under duress. The order over-ruling the demurrer appears in the Record on pages 78-79 and it embodies a general exception; but neither the order nor the exception were made part of the Record by bill of exceptions—they were merely transmitted by the Clerk of the District Court to the Clerk of this Court, and printed in the Record. The demurrer being a pleading, it is part of the Record without being incorporated in the bill of exceptions, but the order over-ruling it is not an order that affects the merits or that necessarily affects the judgment, so that it is not a part of the Record, and cannot become so except by being incorporated in the bill of exceptions.

Counsel does not claim that the allegations in themselves are insufficient to set up duress, but that the counterclaim is one that could not be set up in this action. In presenting this point appellant's counsel proceed upon the assumpton that an action of replevin is always one that sounds in tort, and upon the further assumption that the action is based upon nothing except the refusal of the defendant to deliver the replevined property upon demand. To support this proposition appellant relies upon the case of *McGarger vs.*

Wiley, 229 Pac. 665. In that case, however, the contract which serves as the foundation for the plaintiff's action was not set forth in the Complaint; in the case at Bar the contract is set forth and the case itself can be distinguished from the case at bar in the manner that two Kansas cases were distinguished by the Supreme Court in a case to which reference will presently be made.

While the Supreme Court has set this whole question at rest by holding against the doctrine announced by the Oregon Court, it is interesting to note in passing that the reasoning employed by the Supreme Court of Oregon was not sufficiently convincing to satisfy Judge Bean and Judge McBride, both of whom dissented. However, in view of the decision by the Supreme Court in the case of *Clement ve. Field*, 147 U. S. 467; 13 Sup. Ct. Rep. 358, it is unnecessary to inquire into the reasoning advanced by the Supreme Court of Oregon. In Clement vs. Field the Court was called upon to pass upon the identical question before the Supreme Court of Oregon—that is to say, of whether in an action of replevin brought to recover a portion of property held under a contract of sale the defendant could set up a counter-claim claiming damages for breach of warranty in the contract of sale, and the Court held that this could be done. In passing upon the question it is said:

> "Another objection urged to the judgment of the court below is that the action in replevin was an action founded upon tort, and not upon

contract; that a set-off can, under the Code of Kansas, only be pleaded in an action founded on contract; and that hence the defendants in the replevin suit in question could not legally plead a set-off of the damages caused by the breach of warranty.

"The supreme court of Kansas disposed of this contention in *Gardner vs. Risher*, 35 Kan. 93, 10 Pac. Rep. 584, which, like the present, was a case wherein the plaintiff sought, by a writ of replevin, to enforce the provisions of a chattel mortgage, and the defendant set off against the notes secured by the mortgage certain damages incurred by reason of breaches of a contract. The court held that, as the plaintiff's claim was really founded on contract, the defendant could, notwithstanding that the form of the action was replevin, avail himself, by way of set-off, of damages caused by the failure of the other party to the chattel mortage to comply with his contract.

"The later case of *Kennett vs. Ficket*, 41 Kan. 211, 21 Pac. Rep. 93, is cited on behalf of plaintiff's in error as holding that a set-off cannot be pleaded as a defense in an action of replevin, because such an action is founded upon the tort or wrong of the defendant, and not upon contract. An examination of these two cases satisfies us that they are not irreconcilable. They were both suits in replevin, but in the earlier case the plaintiff's cause of action originated in the provisions of a chattel mortgage, and the suit in replevin was resorted to in pursuance of one of those provisions, and was regarded by the court as in substance founded on contract. The later case was founded on a wrongful taking by the defendant of property of the plaintiff, and was therefore, in substance as well as form, an action ex delicto.

> "The replevin suit pleaded in answer in the present case was substantially a proceeding in enforcement of contract provisions, and therefore within the decision in *Gardner vs. Risher*, 35 Kan. 93, 10 Pac. Rep. 584."

It will be noted that in the case at Bar the Complaint sets forth the original contracts, the supplemental contracts, and the facts constituting the alleged breach upon which the right to recover the property is based.

The Alaska statute, as is pointed out by counsel for appellant in his brief, contains two sections. The first provides:

> "First. A cause of action arising out of the contract or transaction set forth in the Complaint as the foundation of the plaintiff's claim."

Now the first question that arises it: Does this counter-claim, under which it is sought to recover these monies alleged to have been paid under duress, embrace a cause of action arising out of the contract or transaction set forth in the Complaint as the foundation of the plaintiff's claim? The contract is pleaded in the Complaint and the identical contract is pleaded in the counter-claim. Appellants claim the right to recover the equipment because certain service charges and certain charges for equipment were not paid in accordance with the contract. Appellee claims that these service charges were not due under the contract and that he was compelled, by duress, to pay a consid-

erable amount in the way of service charges which under the contract he had not agreed to pay; and that he was, under the contract, entitled to the possession of certain equipment of which appellant threatened to deprive him if these service charges were not paid; and that, because of the ruinous effect this would have on his business, he paid the service charges. This counterclaim, if well-founded, would, of course, defeat appellant's claim of something less than $100 for additional and spare parts, which, while it was not established by the evidence, was nevertheless included in the Complaint; and in addition to this it would result in reimbursing appellee for alleged service charges collected under duress. The whole matter forms but a single transaction which consists of a series of acts commencing with the signing of the contracts and terminating with the taking of the equipment under the writ of replevin.

The Courts, in construing this section of the Statute, are extremely liberal, not only because it prevents a multiplicity of suits, but also because liberality in its construction promotes the ends of justice—especially in such cases as the case at Bar. Here the appellant, a foreign corporation, comes to Alaska and invokes the aid of the Alaskan Court for the purpose of recovering a judgment against a resident of Alaska. Its business is not such as to require domestication, and the appointment of an agent upon whom service of process can be made. If these matters required the

bringing of an independent action, appellant could come to Alaska, litigate a portion of the differences existing between the parties, and then retire so as to compel the appellee to pursue it and bring action against it in the Courts of New York; obviously, this would result in a denial of relief. It is just such situations as these that induce the Courts to adopt a liberal construction of these statutes. Thus in the case of *Advance Thresher Co. vs. Klein*, 133 N.W., 51, the Supreme Court of South Dakota held that in an action brought to recover a balance due from the sale of a threshing machine the defendant could set up a counter-claim for damages to his son resulting from the negligence of the agent of the threshing machine company. The facts, briefly stated, are these: The plaintiff had sold the defendant a threshing machine; it had agreed to keep the machine in repair, and defendant had agreed to help the plaintiff in making repairs. The plaintiff's agent, sent on one occasion to make repairs, called on defendant's boy to help him, and then suddenly started the machinery in such a way as to injure the boy. The boy, it was claimed, was helping as the representative of the defendant in connection with his agreement to help put the equipment in repair. The father had paid out a considerable sum as doctors' bills and had suffered other losses due to the boy's minority, and claimed a sum considerably in excess of the amount claimed due on the threshing machine. The Court held that this counter-claim could be sustained under the statute.

The Court held that the term "transaction" was not limited to the facts set forth in the complaint, but included the entire series of acts and mutual conduct of the parties in the business or proceeding between them which formed the basis of the agreement. In the course of the opinion it is said:

> "The plaintiff is not at liberty to select an isolated act or fact, which is only one of a series of acts or steps in the entire transaction, and insist on a judgment on that fact alone, if the fact is so connected with others that it forms only a portion of the transaction."

The decision is based, in part, upon the case of *Story & Isham Commercial Company vs. Story*, 34 Pac. 671-673. This decision is by the Supreme Court of California.

So also in the case of *Bannerot vs. McClure*, 90 Pac. 70-71, it is said by the Supreme Court of Colorado:

> "The word 'transaction' is much more comprehensive than the word 'contract.' Any cause of action, therefore, whatever its nature, arising out of the cause of action alleged in the complaint, or connected therewith, in favor of the defendant and against the plaintiff, is a proper counterclaim."

In the case at bar, the right of the plaintiff to recover hinges on the construction of the contracts between the parties with relation to service charges; and the right of the defendant to recover on this par-

ticular contract hinges, at least to a very large extent, upon the same matters. All the dealings between the parties relating to these service charges, and relating to the equipment and the keeping of the equipment in appellee's theatre under the contracts, form part of a single transaction.

But the Alaska statute, correctly quoted on page 35 of appellant's brief, contains a second provision which reads as follows:

> "Second. In an action arising on contract any other cause of action arising also in contract and existing at the commencement of the action."

Now, under the Supreme Court decision above referred to, there can be no doubt that the present action, even though it is an action in replevin, is an action on contract. That being true, any other action also arising on contract may form the basis of a counterclaim.

It may be a tort to extort money under duress, but it does not follow that an action brought to recover monies so extorted is an action sounding in tort. When one extorts money from another, the law raises a promise to re-pay it, and when an action is brought to recover this money, the action may be brought on this implied promise; in other words, the victim from whom money has been extored may sue in tort for damages or he may sue in contract to recover the money. At common-law, the form of action would be implied

assumpsit, and in such cases it would be necessary to plead a fictitious promise to re-pay. But under the Code this is not necessary—under the Code it is necessary only to set up the facts—fictitious promises need no longer be averred.

Under this counterclaim the defendant does not seek to recover damages, but he seeks to recover the money paid, and the law raises the implied promise to re-pay. The action, therefore, is one sounding in contract; appellee has simply waived the tort and sued in assumpsit. This being true, the counterclaim is admissable as a cause of action arising on contract in a case where the action is founded on a contract. This is especially so because any recovery had on this counterclaim could be set off against monies claimed by appellant for spare parts or otherwise.

POINT VI.

Under this title, counsel maintains that the Court erroneously instructed the jury as to the measure of appellee's damages.

The Court gave the jury two instructions: No. 8 which appears on page 1005 of the Record, and No. 10 which appears on page 1010 of the Record. These two instructions are identical, and differ only in that one refers to the Juneau and the other to the Ketchikan theatre. They relate to the recovery that might be had by appellee under his counterclaims. To the giv-

ing of these instructions the appellant took the following exception:

> "Thereupon plaintiff, in the presence of the jury and before it retired for deliberation, excepted to the court's foregoing instructions (Nos. 8 and 10, Pars. 2, 3, 7, 9, these two instructions being the same except that No. 8 related to defendant's Coliseum Theatre at Juneau, whereas No. 10 related to defendant's Coliseum Theatre at Ketchikan) reading as follows: * * * . Then follow the portions of the instruction excepted to. They are set forth in the Record on pages 1026, 1027, and the upper portion of page 1028. After the portions of the instruction excepted to are set forth at length, the Record proceeds as follows on page 1028:
>
> "Which exception was as follows:
>
> "Also take exception to instruction number 8, Your Honor, particularly upon the ground we claim that is not a statement of the true measure of damages and no profits can be recoverable in this case in any event, and furthermore, that the defendant can not recover in this action upon his counterclaims in any event, and further, that portion concerning the purchase of new equipment, found on page 27 (last Par.) of that particular instruction, which we contend is not an element of damages in this case. * * * The same exception to instruction No. 10 as we took to instruction No. 8."

The language employed in stating the exception is too general and does not point out any particular in which the court is alleged to have erred. It is said:

"We claim that is not a true statement of the measure of damages." But the exception does not state what the true measure of damages is or in what particular the statement made by the court is in error. It is also to be noted that the portion excepted to does not contain a statement of the measure of damages at all—that is dealt with in a portion of the instruction not excepted to. It is then said, "and that no profits can be recoverable in this case in any event." Now, no one will contend that anticipated profits cannot be recovered in a proper case; and this exception does not inform the court why this is not a proper case. The exception then proceeds: "and furthermore, that the defendant cannot recover in this action upon his counterclaims in any event." But it is not stated why the defendant cannot recover. To say that a party cannot recover, is not to point out a specific error in instructions. The exception continues, "and further that portion concerning the purchase of new equipment found on page 27 (last Par.) of the particular instruction, which we contend is not an element of damages in this case." Here it is said that the appellant contends that this is not an element of damages in this case, but it is not pointed out upon what the contention is based. The court's attention is not directed to anything except a contention of counsel in general and sweeping terms. Moreover, counsel for appellant does not discuss or question the propriety of allowing damages for the new equipment purchased, in his brief. We therefore take it that that portion

of the exception is waived by him. The point is discussed in the original brief, but will not be discussed in this brief for the reasons stated.

That the loss of profits from the destruction or interruption of an established business may be recovered, where the plaintiff makes it reasonably certain by competent proof what the amount of his loss actually was, it well settled by the authorities:

Central Coal & Coke Co. vs. Hartman, 111 Fed. 96-98.

Homestead Co. vs. Des Moines Electric Co. 248 Fed. 439-445.

Yates vs. Whyel Coke Co. 221 Fed. 603.

Alison vs. Chandler, 11 Mich. 542, 558; 13 Cyc. 59.

Lumber Co. vs. Creamery, 18 Fed. 2nd. 858.

Wellington vs. Spencer, 132 Pac. 675.

Lambert vs. Haskell, 80 Cal. 611, 22 Pac. 327.

Chapman vs. Kirby, 49 Ill. 211.

Tootle vs. Kent, 12 Okl. 674; 73 Pac. 310.

Denver vs. Bowen, 184 Pac. 357.

Sommer vs. Yakima, 26 Pac. 2nd. 92.

Ft. Smith & Western RR. Co. vs. Williams, 30 Okl. 726, 121 Pac. 275, 40 L.R.A. (N.S.) 494.

The portions of the instruction excepted to are so fragmentary and incomplete that they do not convey any meaning unless read in connection with what follows and preceeds. The entire instruction No. 8, which

is exactly like instruction No. 10, appears on page 1005 et seq. of the Record. The portions excepted to are set forth on page 1026 et seq. of the Record, and the entire instruction, with the portions excepted to in italics, is set out in our original brief on page 159 et seq.

In its Brief appellant urges two objections against the instructions of the Court, which are as follows:

> "A. The jury was permitted to award double damages;
>
> "B. The jury was permitted to award damages for lost profits which were wholly speculative and conjectural."

Neither of these grounds is included in any exception taken at the trial; nor are they referred to in any error assigned.

Point A. is discussed on page 40 et seq. of appellant's Brief. It is there urged that under the instructions given, the jury were permitted to assess double damages. It is a complete answer to all that is said by appellant in its Brief that no exception was taken on this ground. Nowhere in the Record is there an exception on the ground that under these instructions, or any other instructions, the jury were permitted to award double damages.

But there is no merit in the point stated by counsel. It is true, that as a general proposition, double damages cannot be allowed, but under the instructions

in this case the jury were not permitted to award double damages. It must be remembered that the appellant leased to appellee this theatre equipment for a period of ten years, and that appellee paid appellant, in advance, prior to the removal of the equipment, the full sum of $10,500.00 as rent for the equipment in each theatre; that is to say, the sum of $21,000.00 for the equipment in the two theatres, so that appellee had an estate or an interest in this equipment worth $21,000.00 at the time of its installation, and a proportionate amount to cover the unexpired term at the time of its removal. When the equipment was removed, this estate or interest was destroyed, and the rental value sought to be recovered was merely the value of this estate or interest which was destroyed by appellant; it amounted merely to a recovery of advance rent paid appellant by appellee. This amount appellee would have had a right to recover in any case; but in this particular case the taking of the property had the additional effect of interrupting and interfering with a going, established, business, so that it resulted in additional damages, and these additional damages consist of the profits that would have been realized if the equipment had been left in place. The authorities and cases cited by counsel have no application. In the cases cited, the property was taken and returned, so that there was no loss of property, no diminution of the estate or interest in it, because the property itself was returned to the injured party. In

the case at bar, the equipment was taken away and shipped out of the territory, and was never returned to the appellee, so that he lost all that he had paid the appellant as rent for the equipment during the entire remaining portion of the ten-year period. When appellant broke its contract by wrongfully taking the equipment from the appellee, the advance rent paid by appellee for the remainder of the term was one of the elements of damage which appellee suffered and had a right to recover; and because of the fact that the taking of the property from appellee resulted in breaking up an established business, the profits that were lost were another item of damages which the appellee had a right to recover. It is not necessary to pursue this argument further, however, because the point cannot avail the appellant, for the reason that it was not included among the grounds of exception taken.

Referring now to Point B. which is discussed on page 42 et seq. of appellant's Brief, and which is to the effect that:

> "The jury was permitted to award damages for lost profits which were wholly speculative and conjectural."

The character of the evidence offered was discussed with some degree of detail in the original brief, but since counsel does not question its sufficiency except in the particulars mentioned in the brief, it is only necessary to deal with the evidence in so far as it relates to these particular objections.

But before doing this, we feel that we should again call the Court's attention to the fact that the matters here referred to by counsel were not embodied in any exception taken, and that the portions of the instruction submitting the issue of damages to the jury were not excepted to at all on any ground. The propriety of submitting the issue to the jury was therefore established as the law of the case. And even though appellant did ask for an instruction, which though uncertain and indefinite in its terms might possibly be regarded as a request to take the issue from the jury, appellant cannot now contend that the Court erred in submitting the issue and refusing its instruction, because by failing to except to the instruction submitting the issue, which thereupon became the law of the case, it waived the point now sought to be urged. Then, too, nothing but a general exception was taken to the refusal of the Court to give this instruction so requested, and no grounds of exception were stated. (Pr. Rec. P. 979)

Commencing on page 42 of appellant's Brief, appellant's counsel states the effect of the evidence to be as follows:

> "When plaintiff removed its equipment from defendant's theatres, defendant replaced that equipment with other equipment, which, although the best then obtainable, was inferior in sound quality to plaintiff's equipment. During the two years from approximately June 1, 1929 to May 1, 1931, while plaintiff's equipment was in defen-

> dant's theatres, defendant operated those theatres at an average monthly profit of $2,000.52 at Ketchikan and $864.15 at Juneau. During the period after plaintiff's equipment had been removed, from approximately May 1, 1931, to May 1, 1933, defendant operated those theatres at an average monthly loss of $187.70 at Ketchikan and $489.98 at Juneau, whereupon defendant leased both theatres to one Shearer who, shortly thereafter, removed the equipment then in these theatres and replaced it with plaintiff's equipment, similar to that originally installed and subsequently removed by the plaintiff. During the eighteen months immediately following the reinstallation of plaintiff's equipment in these theatres, Shearer, the lessee, operated the Ketchikan theatre at an average monthly profit of $629.70 and the Juneau theatre at an average monthly loss of $267.62"

This statement of the evidence is very incomplete, but it is fair enough as far as it goes and it includes all the proof required by the courts to recover lost profits in cases where an established business has been interrupted. It should be borne in mind, however, in this connection, that both the Ketchikan and Juneau theatres were operated by Shearer for some considerable time with the inferior equipment installed, and that during this period his losses were as great as those sustained by Gross, and that the profits commenced to increase immediately after the installation of better equipment, and that the business which had been broken down because of the inferior equipment was gradually built up after the new equipment had

again been installed, so that the average monthly profit at Ketchikan, including the months while Shearer was operating with the inferior equipment, was $629.70 while the average monthly loss at Juneau, including the months while the inferior equipment was still in the theatre, was $267.62. And in this connection it must also be borne in mind that there were special reasons why the profits in Juneau did not increase to the same extent that those in Ketchikan had increased, under the Shearer management. (Pr. Rec. PP. 470-471)

Thereupon, on page 43 of appellant's Brief, counsel submits the following conclusions:

> "(1) Defendant wholly failed to show that plaintiff's removal of its equipment caused defendant any loss of profits.
>
> "(2) Defendant wholly failed to show the amount of such loss, if any, caused by the removal of plaintiff's equipment."

At this point it should be stated that while we reviewed the evidence in the original brief with a view of showing its sufficiency, we will not burden the Court with a similar discussion in this brief because as we understand the brief of counsel for appellant, the sufficiency of this evidence is not questioned except in respect to the points expressly set forth in the brief; and on page 42 of appellant's brief counsel states the effect of the evidence, not fully but fairly, in so far as the statement goes. According to this state-

ment it is made to appear that appellee proved what his profits were during a period of two years before the equipment was removed and what the profits and losses were after the equipment had been removed until the theatres were leased to one Shearer, and also showed what the profits were after Shearer had reinstalled appellant's equipment. This is all that the authorities require in view of the fact that there is no question in this case but what the appellee had an established business that had been profitable for many years prior to the removal of the equipment. (Pr. Rec. PP. 362-363-374)

On page 43 of appellant's Brief counsel says:

> "It is well settled that lost profits cannot be recovered unless both the fact and the amount of such loss is established by something more than speculation or conjecture."

We fully agree with this statement, but we do not agree with counsel's conclusions as to what is required to satisfy the requirements mentioned. To support his views, that appellee did not comply with these requirements, counsel quotes from the case of the *Homestead Company vs. DesMoines Electric Company,* 248 Fed. 439. This decision was rendered by Judge Sanborn, and was based upon a decision previously rendered by the same Judge in the case of the *Central Coal & Coke Co. vs. Hartman,* 111 Fed. 96.

Following the quotation set out by counsel occurs a citation of this case and no reference to any other authority, so that there can be no question but what Judge Sanborn intended, for all intends and purposes, to embody what was said in the Central Coal & Coke Company case, as part of what was said in the Homestead case.

Now, in the case of the *Central Coal & Coke Co. vs. Hartman*, 111 Fed. 96, after stating that as a general rule profits cannot be recovered, Judge Sanborn says:

> "There is a notable exception to this general rule. It is that the loss of profits from the destruction or interruption of an established business may be recovered where the plaintiff makes it reasonably certain by competent proof what the amount of his loss actually was. The reason for this exception is that the owner of a long-established business generally has it in his power to prove the amount of capital he has invested, the market rate of interest thereon, the amount of the monthly and yearly income he derives from it for a long time before, and for the time during the interruption of which he complains. The interest upon his capital and the expenses of his business deducted from its income for a few months or years prior to the interruption produce the customary monthly or yearly net profits of the business during that time, and form a rational basis from which the jury may lawfully infer what these profits would have been during the interruption if it had not been inflicted. The interest on the capital investment and the expense deducted from the income during the interruption

> show what the income actually was during this time; and this actual net income, compared with that which the jury infers from the data to which reference has been made, the net income would have been if there had been no interruption, forms a basis for a reasonably certain estimate of the amount of the profits which the plaintiff had lost."

In the case at bar, appellee did just exactly what was required by the decision of Judge Sanborn last above quoted from. The capital investment was carefully arrived at, interest was allowed on it, the property was depreciated in a manner that was not questioned by anyone, the amount of the monthly expenses covering the business and the amount of the monthly income derived from it were shown not only for a long time before but also during the interruption of which appellee complains. (Pr. Rec. PP. 366; Pr. Rec. P. 485, 506, 520, 534; Pr. Rec. P. 548, 549; Pr. Rec. PP. 558, 559, 560; Pr. Rec. PP. 561, 562, 563, 564, 565, 566 et seq.; Pr. Rec. P. 573; Pr. Rec. PP. 578, 598, 614, 631, 647; Pr. Rec. P. 656; Pr. Rec. P. 658 et seq., Pr. Rec. PP. 482-483; Pr. Rec. PP. 597, 504; Pr. Rec. PP. 708, 709, 710, 712, 720, 723; Pr. Rec. PP. 653, 654, 757, 504; Pr. Rec. P. 505; Pr. Rec. P. 652; Pr. Rec. PP. 575, 712, 765; Pr. Rec. P. 882. All the evidence to which these Record references relate was discussed in the original brief commencing on page 174, but for the sake of brevity and in view of the statements of counsel as to the effect of the evidence, that discussion is not repeated here.

The whole case was tried with a view of bringing it within the provisions laid down by Judge Sanborn.

At a later point in the decision Judge Sanborn indicates the character of proof required, and here again the decision was followed in the case at bar to the letter.

Following this quotation from the Homestead case, on page 44 of appellant's Brief, counsel makes the statement that the removal of appellant's equipment in April, 1931, could not have caused the defendant any loss of profits unless it caused a decrease in the number of persons attending defendant's theatres, and it is then contended that there was no evidence that the decrease was due to the removal of appellant's equipment.

Well, in addition to the fact that the appellee Gross, testified that there was a loss of business immediately after the inferior equipment was installed (Ev. Gross, Pr. Rec. P. 362); we have these uncontradicted facts before us—facts which are embodied in the statement of the evidence as counsel sets it forth on page 42 of his brief. Plaintiff's efficient sound-equipment was taken out of a sound moving-picture theatre, and in its place equipment of an inferior character was installed. This was followed by a loss of attendance and a loss of profits. Now, would any rational person be warranted in assuming that this loss of attendance and loss of profits did not result from the fact that

inferior equipment had been installed in the place of the efficient equipment that had been removed? But all this was for the jury.

Counsel seems to be of the opinion that appellee should have called each of his customers who ceased going to the theatre after the inferior equipment had been installed, and who ceased going because the equipment was inferior. We are of the opinion that the trial court would soon have put an end to the calling of such witnesses.

If counsel's position upon this point were sound, one who had destroyed or interrupted a mercantile business, for instance, could not be called upon to pay damages unless the injured party brought in all his customers, who had to buy a yard of calico or a pound of sugar, and had them testify that this failure to buy calico and sugar was due to the injurious act of the person who had destroyed or interrupted the business —and like results would follow in connection with all other lines of business.

Counsel then says, on page 44 of appellant's brief:

> "Under the evidence, as the case went to the jury, the decrease in attendance at defendant's theatres in May 1931-33 might have been caused by any one of many equally possible causes, other than the removal of the plaintiff's equipment."

Counsel complains because the appellee did not affirmatively prove that the depression was not in

any way to blame for the loss of his profits. He also complains because the appellee did not affirmatively prove that the loss of profits was not due to competition or to the use of inferior pictures. He might complain with equal propriety because the appellee did not affirmatively show that the loss of profits was not due to dust-storms, droughts, floods, sun-spots, or to a hundred and one other things that might in some cases cause a loss of profits. But it was not incumbent upon appellee to negative the possible effect of any of these agencies by affirmative proof. This very point was before the Supreme Court of Illinois in the case of *Chapman vs. Kirby*, 49 Ill. 211. In that case the Court used this language:

> "It has long been well recognized law that when deprived of such business by slander, compensation for its loss may be recovered in this form of action. And why not for its loss by this more direct means? And of what does this loss consist, but the profits that would have been made had the act not been performed by appellants? And to measure such damages, the jury must have some basis for an estimate, and what more reasonable than to take the profits for a reasonable period next preceding the time when the injury was inflicted, leaving the other party to show that by depression in trade, or other causes, they would have been less? Nor can we expect that in actions of this character, the precise extent of the damage can be shown by demonstration. But by this means they can be ascertained, with a reasonable degree of certainty."

It will be noted that the Court says:

> "And to measure such damages, the jury must have some basis for an estimate, and what more reasonable than to take the profits for a reasonable period next preceding the time when the injury was inflicted, leaving the other party to show that by depression in trade, or other causes, they would have been less?"

The burden of showing that the depression, or any other cause, had any effect upon the matter, therefore rested upon the appellant; nor could it be otherwise. If appellee were called upon to prove that the depression did not affect the situation, he would also be called upon to prove, for the same reason, that no other possible cause had had any effect upon it. A rule such as this would result in compelling the anticipation of one hundred and one defenses that would have no existence in fact. The fact is that appellant did offer evidence by which it attempted to prove that the depression and incoming competition had something to do with a loss of profits, and that the Court gave to the jury an instruction directing them to consider this evidence. The instruction referred to being No. 11-B (Pr. Rec. P. 1016), and that the jury evidently considered all this evidence very carefully. This is evident from the fact that the amounts allowed for lost profits, by the jury, were very much less than the total amount of profits actually lost, as established by the evidence, in dollars and cents.

The case cited by counsel on page 45 of appellant's Brief, *Willis vs. S.M.H. Corporations*, 259 N.Y. 144, has no possible application. The plaintiff in that case was a mere employee who had been discharged. He was not a man who had an established business that had been interrupted. True, part of his remuneration came from his solicitation of members to a Club, but no one would call this an established business.

Counsel then enters into a discussion relating to the weight of the evidence with special reference to App. A. and B., published on page 54 of appellant's brief. While the figures referred to by counsel do not in any way show what counsel contends for, it is unnecessary to make any further reference to this portion of the discussion in appellant's brief. The weight of the evidence is a question for the jury and all this portion of counsel's brief relates to a discussion of the weight of the evidence. To discuss these figures would involve a discussion of all the evidence, explanatory and otherwise, relating to them—this might be interesting but it would not be profitable for it would present nothing that the jury were not called to pass upon.

Appellant's counsel then proceeds to consider the second proposition on page 49 of his Brief, and maintains that defendant has wholly failed to show the amount of his loss of profits, if any, caused by the removal of the plaintiff's equipment. In support of this proposition appellant quotes four and one half

lines from the opinion of the *Central Coal & Coke Company vs. Hartman,* 111 Fed. 96. Immediately following the portion of the opinion quoted by counsel occurs this language:

> "The reason for this exception is that the owner of a long-established business generally has it in his power to prove the amount of capital he has invested, the market rate of interest thereon, the amount of the monthly and yearly expenses of operating his business, and the monthly and yearly incomes he derives from it for a long time before, and for the time during the interruption of which he complains. The interest upon his capital and the expenses of his business deducted from its income for a few months or years prior to the interruption produce the customary monthly or yearly net profits of the business during that time, and form a rational basis from which the jury may lawfully infer what these profits would have been during the interruption if it had not been inflicted. The interest on the capital and the expenses deducted from the income during the interruption show what the income actually was during this time; and this actual net income, compared with that which the jury infers from the data to which reference has been made the net income would have been if there had been no interruption, forms a basis for a reasonably certain estimate of the amount of the profits which the plaintiff had lost."

Had counsel read on until he had read the whole opinion, he would have found that the evidence in this case complies exactly with the requirements of the decision in the case of the *Central Company vs. Hartman,* in which this opinion was rendered.

Counsel refers to the case of *Freidman vs. McKay Leather Co.* 178 Pac. 139, but that case is not in point. That was not an action to recover prospective profits for the interruption of an established business. Even so, however, statements made by the Court in that case are such as to indicate that the Court recognized the fact that where prospective damages can be proved with reasonable certainty, as they can be in a case where an established business is interrupted, such damages are recoverable.

Counsel then again returns to the case of *Central Coal & Coke Company vs. Hartman*, 111 Fed. 96, and quotes another portion of that opinion, including the statement:

> "And the monthly and yearly income he derives from it for a long time before and for the time during the interruption."

Counsel again breaks off his quotation too soon. He cites this authority with a view of showing that it is not sufficient to show what the profits were for a period of two years, and that two years, according to counsel's view, is not a long time, while the Court says "for a long time before;" but if counsel had added a few more lines to his quotation he would have been informed upon the question as to what the quotation meant by the use of the term "for a long time before," for immediately following the word "complains" with which he ends his quotation, occurs the following, "The

interest upon his capital and the expenses of his business deducted from its income for a few months or years prior to the interruption." The term "for a long time" therefore means for a few months or years. In the case at bar the exact income for a period of two years was established by appellee not only for a few months but it would be 24 months—many months.

In addition to this, however, there is other evidence in the Record, and it is that appellee had been conducting these theatres for a period of something like 20 years, and that during that entire period there had never been a time these theatres were not profitable and were not paying investments. (Pr. Rec. P. 362)

While the exact amount of profits was only shown for a period of two years, we do not believe that any Court would permit a party to encumber the Record by showing what his exact profits were, from his books, for a period of twenty years, even though the books covering this entire period had been preserved, which would in no case be likely.

On page 53 counsel complains, although there is no exception relating to it, that the Verdict must have been speculative because the jury didn't award the appellee all the damages that he proved; in other words, the total amount proved for Ketchikan and Juneau were in each case much larger than the amount of damages allowed. But counsel forgets that the

Courts permit the party inflicting the injury to introduce evidence of depressions, incoming competition, and of any other fact that would tend to lessen the damages; this is merely evidence allowed in mitigation. If the law permits the party inflicting the injury to offer such evidence, it must follow that the jury have a right to consider it. In this case the jury evidently considered the evidence offered by appellant upon these points, and accordingly reduced the damages that would other wise have resulted. Surely appellant shouldn't complain of that.

Moreover, the Verdict is not objected to on the ground that it was speculative, nor is that point urged by any exception or error assigned anywhere in the Record.

Counsel says that no case could be found to better illustrate the injustice of allowing the jury to mulct a party in large damages. Counsel's position evidently is that appellant should be allowed to lease this equipment, collect the rent for ten years, at the end of two years take it out, keep the equipment and also the advance rent that had been collected, and that if the taking out of the equipment destroyed appellee's business it was just too bad. We do not think that any such doctrine finds any support in the law. It is correct to say that as a general proposition speculative damages cannot be recovered in any case, but this does not mean that damages must be proved to a mathematical

certainty. Damages are allowed for pain and suffering, for injuries depending for their severity upon the uncertain duration of life, for loss of earning power, the value of which must necessarily depend not only upon the duration of life but also upon the opportunities to earn that the future may present, and for one hundred and one other things that are such that the amount of the damages cannot be determined with mathematical exactness, but it must be left to the sound discretion of the jury. And in this case the jury were fully and properly instructed upon speculative damages and the degree of certainty required. All that the law requires is that facts be established from which the jury can establish the amount with a reasonable degree of certainty. The authorities we have cited, establish the fact that the appellee in this case produced evidence of facts that in every way meet this requirement of the law; and counsel has produced no authorities whatever to show that this requirement has not been met.

CONCLUSION

This is not a case where it is assigned as error that the verdict is not sustained by sufficient evidence, or that the verdict is excessive. Indeed, the record shows that the verdict might have been for a much larger amount without being open to either of these objections.

It is important to note at this point that nearly all of the exceptions brought up for review are general in their nature and state no ground of exception at all, and that in those cases where there is an attempt to state grounds of exception, the grounds are stated in such general and uncertain terms that they present nothing for consideration, for the reason that they do not sharply and specifically call the trial court's attention to the error, if any, so that it might be corrected. Indeed, some matters, as we have pointed out, that were discussed by counsel under the six points in appellant's Brief, relate to things that were not excepted to at all. While we have not discussed the facts in this Brief, we think that sufficient has been said to show that the equities in the case are all in favor of appellee, and that the trial judge committed no error, so that the judgment should be affirmed.

Respectfully submitted,

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